APPEAL NO. 042660
FILED NOVEMBER 24, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on September 2, 2004. The hearing officer resolved the disputed issues by deciding that the compensable injury of _____, does not extend to include an injury to the lumbar spine consisting of a disc herniation at L4-5 or L5-S1; that the appellant (claimant) has not had disability resulting from the compensable injury sustained on _____; and that the issues of the date of maximum medical improvement (MMI) and impairment rating (IR) are not ripe for adjudication; thus, a determination cannot be made. The claimant appealed, disputing the determinations regarding extent of injury, disability, MMI and IR. The claimant also argues that the hearing officer erred by failing to include the issue of whether the respondent (carrier) had waived the right to dispute compensability of the claimant's low back injury at the CCH. The carrier responded, urging affirmance of the disputed issues. The carrier additionally alleged in its response that the claimant's request for review was untimely.

DECISION

Affirmed in part, and reversed and remanded in part.

Initially, we address the carrier's assertion that the claimant's appeal is untimely. Our review of the record reveals that the hearing officer's decision and order was distributed to the parties on September 30, 2004. Effective June 17, 2001, Section 410.202 was amended to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal period. The claimant acknowledged receipt of the decision and order on October 5, 2004. The claimant had until October 26, 2004, to file its appeal. The Texas Worker's Compensation Commission (Commission) received the claimant's appeal on October 26, 2004, therefore, the claimant's appeal is timely filed.

The claimant contends on appeal that the hearing officer erred by failing to include the issue of whether the carrier waived its right to dispute compensability of the claimant's low back injury at the CCH. Section 410.151(b) precludes consideration of an issue not raised at the benefit review conference (BRC) unless the parties consent or the Commission determines that there was good cause for not raising the issue at the BRC. The hearing officer did not err when she declined to add the waiver issue requested by the claimant.

The parties stipulated that on _____, the claimant sustained a compensable injury. At issue was whether the compensable injury included an injury to the lumbar spine consisting of a herniation at L4-5 and/or L5-S1 and whether the claimant had disability. We have held that the questions of disability and extent of injury are questions of fact for the hearing officer. Texas Workers' Compensation

Commission Appeal No. 93613, decided August 24, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In the present case, there was simply conflicting evidence on the issues of disability and extent of injury, and it was within the province of the hearing officer to resolve these conflicts. Applying the above standard of review, we find that the hearing officer's extent-of-injury and disability determinations were sufficiently supported by the evidence in the record.

The claimant acknowledges in his appeal that the hearing officer's determinations regarding MMI and IR were predicated on her finding that the claimant's compensable injury did not include a lumbar disc herniation. The record supports the hearing officer's finding that no valid certification of MMI and IR was based on the compensable injury alone. However, the determination that the issues of the date of MMI and IR are not ripe for adjudication is reversed and the issues of MMI and IR are remanded back to the hearing officer for further action consistent with this decision.

Section 410.251 requires a party to exhaust its administrative remedies and be aggrieved by a final decision of the Appeals Panel before it seeks judicial review. Although the evidence as presented precluded the hearing officer from being able to make a final determination regarding MMI and IR, Section 410.163(b) requires that a hearing officer shall ensure the preservation of the rights of the parties *and the full development of facts required for the determinations to be made*. [*Emphasis added.*] Until a determination is made regarding MMI and IR there can be no final decision from which judicial review may be sought. Albertson's, Inc. v. Ellis, 131 S.W.3d 245, 248-249 (Tex. App.- Fort Worth 2004, pet. denied).

Because there is no certification of MMI and IR in the record, which rated the compensable injury only, we remand this case back to the hearing officer for further

consideration and development of the evidence. The hearing officer should instruct the doctor, currently acting as designated doctor, to certify the date of MMI and assess an IR based on the compensable injury only. Both parties should be allowed an opportunity to respond to the amended certification and rating provided in reply by the designated doctor. If the designated doctor is no longer qualified or is unwilling to provide the certification and rating as requested, then another designated doctor should be appointed.

We affirm the hearing officer's determinations that the compensable injury of _____, does not extend to include an injury to the lumbar spine consisting of a disc herniation at L4-5 or L5-S1, and that the claimant has not had disability. We reverse the hearing officer's determination that the issues of MMI and IR are not ripe for adjudication and remand the case for further development of the evidence by the hearing officer.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge